DEPARTMENT OF STATE REVENUE

04-20160349.LOF

Letter of Findings Number: 04-20160349
Sales/Use Tax
For The 2012, 2013, and 2014 Tax Years

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana Car Dealership was liable for the sales tax on (1) various vehicles which it sold to out-of-state purchasers but failed to properly document the delivery to out-of-state location, and (2) the optional products sold to customers. Dealership was not liable for use tax on three purchases. Negligence penalty could not be abated.

ISSUES

I. Sales Tax - Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-24; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Miller Brewing Co. v. Indiana Dep't of State Revenue, 903 N.E.2d 64 (Ind. 2009); Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Frame Station, Inc. v. Indiana Dep't of Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002); Cowden & Sons Trucking, Inc. v. Indiana Dep't of State Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991); Indiana Dep't of State Revenue v. Martin Marietta Corp., 398 N.E.2d 1309 (Ind. Ct. App. 1979); Galligan v. Indiana Dep't. of State Revenue, 825 N.E.2d 467 (Ind. Tax Ct. 2005); 45 IAC 2.2-2-1; 45 IAC 2.2-4-1; 45 IAC 2.2-5-53; 45 IAC 2.2-5-54; Sales Tax Information Bulletin 28S (April 2012); Sales Tax Information Bulletin 28S (October 2011).

Taxpayer protests the assessment of sales tax.

II. Use Tax - Imposition.

Authority: IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); 45 IAC 2.2-3-4.

Taxpayer protests the assessment of use tax on several purchases.

III. Tax Administration - Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a licensed Indiana car dealership in the business of selling new and used vehicles. Taxpayer's customers include residents and companies from states other than Indiana. Taxpayer occasionally delivers vehicles to its customers' residences or business locations.

In 2015, the Indiana Department of Revenue ("Department") audited Taxpayer's business records and tax returns for the tax years 2012, 2013, and 2014. Taxpayer and the Department both agreed to utilize two statistical sampling methods to project the audit results respectively for Indiana sales and use tax purposes.

Pursuant to the audit, the Department determined that Taxpayer sold several vehicles to its customers but failed to collect sales tax on the transactions which were subject to Indiana sales tax. The audit also found that Taxpayer sold some taxable optional products, including "Express Code," "Express Etch," or "Security Product" to its customers without collecting sales tax. In addition, the audit determined that Taxpayer purchased various items of tangible personal property to be used for its business without paying sales tax or self-assessing and remitting the use tax due. Pursuant to the audit, the Department assessed Taxpayer additional sales tax, use tax, penalty, and interest.

Taxpayer protested the assessment based on various reasons. An administrative hearing was held. Taxpayer subsequently withdrew one item under protest - "mathematical errors." This Letter of Findings results and addresses the remaining items. Further facts will be provided as necessary.

I. Sales Tax - Imposition.

DISCUSSION

During the audit, pursuant to the agreed projection methods, the Department used a block sample to determine the sales tax on Taxpayer's sales of vehicles. The audit also determined that Taxpayer had some taxable sales of optional products, which were connected to the sales of the vehicles before customers' acceptance. Taxpayer, however, did not properly collect the sales tax on those taxable sales. The audit further determined that Taxpayer purchased certain tangible personal property to be used for its business, but it did not pay sales tax or remit the use tax.

Taxpayer disagreed with a portion of the audit's determination, claiming that the Department's assessment is overstated. Taxpayer asserted that it was not responsible for the sales tax imposed on various vehicles sold to out-of-state purchasers because it delivered the vehicles to the customers' locations outside of Indiana. Taxpayer also argued that it sold "insurance policy," including "Express Code," "Express Etch," or "Security Product" to protect the purchasers from vehicle theft. Taxpayer maintained that the sales of insurance policies were not subject to sales tax. In addition, Taxpayer claimed that it was not liable for the use tax on certain purchases because it paid sales tax at the time of purchase, or in the case of one transaction in question which was voided. As a result, it did not owe tax.

Indiana mandates that every person who is subject to a listed Indiana tax must keep books and records, including all source documents, "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). "If the [D]epartment reasonably believes that a person has not reported the proper amount of tax due, the [D]epartment shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment." IC § 6-8.1-5-1(a). All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). "Each assessment and each tax year stands alone." Miller Brewing Co. v. Indiana Dep't of State Revenue, 903 N.E.2d 64, 69 (Ind. 2009). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Also, "all statutes are presumptively constitutional." Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 587 (Ind. 2014) (citing UACC Midwest, Inc. v. Indiana Dep't of State Rev. 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." Caterpillar, Inc., 15 N.E.3d at 583.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a); 45 IAC 2.2-2-1. A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible person property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." Id. "The retail merchant shall collect the tax as agent for the state." Id.

When a purchaser claims the purchase "is exempt from the state gross retail [] tax[], the purchaser may issue an exemption certificate to the seller instead of paying the tax." IC § 6-2.5-8-8(a). The "seller accepting a proper exemption certificate under [IC § 6-2.5-8-8] has no duty to collect or remit the state gross retail [] tax on that purchase." Id. Otherwise, as an agent for the State of Indiana, the seller "holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

Additionally, a statute which provides a tax exemption is strictly construed against the taxpayer. Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101 (internal citations omitted). In applying any tax exemption, "[t]he general rule is that tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Taxpayer in this protest claimed that the audit assessment is overstated based on various reasons. This Letter of Findings addresses them in turn as follows:

A. Sales of Vehicles to Out-of-State Customers

During the audit, pursuant to the projection agreement, the Department sent questionnaires to some of Taxpayer's out-of-state customers in April 2015 inquiring as to the delivery location of the vehicles sold. The Department did so because Taxpayer had not collected sales taxes on the transactions. Taxpayer did not present exemption certificates on those transactions. Based on customers' responses together with Taxpayer's records, the audit concluded that some sales were Indiana retail transactions subject to Indiana sales tax. The audit thus assessed additional tax pursuant to the projection agreement.

Taxpayer claimed that those vehicles at issue were exempt from Indiana sales tax because those vehicles were sold to out-of-state purchasers and delivered to customers outside of Indiana. Taxpayer maintained that the assessment is overstated.

Sales of vehicles in Indiana generally are subject to Indiana sales tax unless the transactions are specifically exempted under Indiana law. One particular exemption relevant to this present case is a retail transaction that qualifies as interstate commerce. IC § 6-2.5-5-24(b); See also 45 IAC 2.2-5-53; 45 IAC 2.2-5-54. Specifically, 45 IAC 2.2-5-54(b), in relevant part, provides that:

> Sales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax, provided the property is not intended to be subsequently used in Indiana.

The Department's Sales Tax Information Bulletin 28S (October 2011), 20110928 Ind. Reg. 045110549NRA, or, subsequently, Sales Tax Information Bulletin 28S (April 2012), 20120530 Ind. Reg. 045120259NRA (collectively, "Information Bulletin 28S"), addresses issues concerning sales of motor vehicles which applies to the tax years at issue. The Information Bulletin 28S further explains, in relevant part, as follows:

> **IV. INTERSTATE COMMERCE EXEMPTION**
>
> A vehicle . . . sold in interstate commerce is not subject to the Indiana sales tax. **To qualify as being "sold in interstate commerce," the vehicle . . . must be physically delivered**, **by the selling dealer to a delivery point outside Indiana**. The delivery may be made by the dealer, or the dealer may hire a third-party carrier. **Terms and the method of delivery must be indicated on the sales invoice**. **The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale**. The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third-party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer; thus, the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. (**Emphasis is original**) (**Emphasis added**).

Thus, a licensed Indiana car dealer generally must either collect sales tax or a sales tax exemption certificate at the time of the car sale. To qualify for the interstate commerce exemption, the dealer must document the terms and the method of delivery on the sales invoice and maintain copies of delivery documents to substantiate that

the vehicles are sold in interstate commerce. Otherwise, the dealer will be responsible for the Indiana sales tax.

During the audit, the Department determined that Taxpayer's records were inadequate. The audit noted that Taxpayer failed to document "the terms and the method of delivery." Thus, the audit was unable to verify that the vehicles at issue were "physically delivered" by Taxpayer or its employees to locations outside of Indiana. As a result, the Department sent letters of questionnaires to those out-of-state purchasers inquiring whether the vehicles were indeed "physically delivered" to out-of-state locations where they took the possession of the vehicles. Based on these verifiable responses, the audit proceeded to make adjustments on the vehicle sales. The audit explained further "while sales in interstate commerce are not subject to the collection of Indiana sales tax, sales where the purchaser[s] accept[] the vehicle in Indiana are subject to [Indiana] sales tax."

In April 2016, Taxpayer submitted copies of form letters (on its company letterhead, which were dated September 11, 2015) signed by its customers. The September 2015 form letters stated that in part the delivery of the vehicles "took place outside of the State of Indiana" and were "not subject to Indiana sales tax." Taxpayer further argued:

> [Taxpayer] contends that it is in compliance with the requirements as the Information Bulletin is not specific on the types of documentation to be kept. On each deal described as an out of state delivery, [Taxpayer] includes a "Delivery Agreement Addendum to Buyer's Order[."] The agreement states that the vehicle will be transferred to the buyer's place of business as specified by the attached buyer's order. The agreement also states that the dealer will deliver the product. Each of the agreements was signed by the buyer, confirming that the seller delivered the products as directed by the buyer's order. . . .

Taxpayer also provided copies of cancelled checks which it paid to drivers to support its argument that the vehicles were physically delivered to its customers outside of Indiana. Taxpayer explained as follows:

> [Taxpayer] regularly delivers vehicles to customers outside of Indiana as a courtesy to the customer[s]. . . . [I]f the vehicle is driven to the customer and additional fuel is needed, the hired driver pays for the fuel and is reimbursed as needed. [Taxpayer] hires individual drivers, not a transportation service, to deliver the vehicle. These drivers may deliver more than one vehicle at a time. These driver[s] are typically paid a flat rate for their time and expenses and generally do not turn in detailed expense reports. [Taxpayer] writes these drivers checks but there are not notes on the checks specifying what was reimbursed. . . .

Taxpayer thus maintained that it was not responsible for the Indiana sales tax because those sales qualified for the interstate commerce exemption.

Upon review, however, Taxpayer's reliance on its supporting documentation is misplaced. Specifically, the "September 11, 2015" form letters were submitted to the Department in May 2016, months after the Department's audit was concluded. Those letters were not notarized and could not be verified. Similarly, copies of cancelled checks showed that Taxpayer paid the individuals certain amount on certain dates, but those checks contained no further information to substantiate Taxpayer's assertion that it reimbursed individuals for physically delivering the vehicles outside of Indiana to out-of-state customers on behalf of Taxpayer. Thus, in the absence of other verifiable documentation, the vehicles at issue are presumed to be sold and accepted at the dealership's Indiana location during the tax years at issue. When the purchasers accepted the vehicles at issue at the dealership's business location in Indiana, the sales of the vehicles were Indiana retail transactions and subject to Indiana sales tax pursuant to the above mentioned statutes, regulations and case law.

In short, in the absence of other verifiable supporting documentation to demonstrate otherwise, the audit properly assessed Taxpayer additional tax because Taxpayer is responsible for the sales tax under IC § 6-2.5-9-3.

B. Sales of Optional Products Other Than Vehicles Prior to Acceptance

In addition to selling vehicles, Taxpayer sold several optional products, including "Express Code," "Express Etch," or "Security Product," to its customers. Taxpayer incorporated those optional products into the vehicles customers purchased prior to the conclusion of the sales. The audit noted that Taxpayer sold "a number of products that were incorporated into the vehicle prior to acceptance" without collecting sales tax. The audit further noted that "[e]ach of the products was comprised of both tangible personal property and [a] service stated together as a single line item on the buyers' orders that were added to the vehicles prior to transfer to [T]axpayer's customers." After reviewing Taxpayer's records and the publicly available information concerning the optional products at issue, the audit concluded that sales of the optional products were taxable retail transactions under 45 IAC 2.2-4-1.

45 IAC 2.2-4-1 in part explains:

> (a) **Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".**
> (b) **All elements of consideration are included in gross retail income subject to tax.** Elements of consideration include, but are not limited to:
> (1) The price arrived at between purchaser and seller.
> (2) **Any additional bona fide charges added to or included in such price** for preparation, fabrication, alteration, modification, finishing, completion, delivery, or **other services performed in respect to** or labor charges for work done with respect to **such property prior to transfer**.
> (3) **No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail**.

(**Emphasis added**).

The Indiana Tax Court has addressed the issue of "mixed transactions" that involve the simultaneous transfer of tangible personal property and the performance of services. In Frame Station, Inc. v. Indiana Dep't of Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002), the taxpayer, Framemakers, provided custom framing services. Specifically, Framemakers framed its customers' art in frames that it built or special ordered. Id. at 130. When it billed its customers, Framemakers "record[ed] separate subtotals on the invoices: one for the service of framing the art and the other for the frame itself." Id. Framemakers collected sales tax only on the price of the frame itself, not on the price for framing the art. Id. The court stated that the issue was "whether Framemakers' sale of custom-framed art constitutes a 'retail unitary transaction' and is thereby subject to Indiana's gross retail and use tax." Id. at 129-30. Specifically, the court focused on "whether Framemakers' services were performed before or after it transferred property to its customers." Id. at 131. (Emphasis in original). The court explained that services that "are performed with respect to property prior to the transfer of the property" are taxable. Id. Referencing Cowden & Sons Trucking, Inc. v. Indiana Dep't of State Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991) and Indiana Dep't of State Revenue v. Martin Marietta Corp., 398 N.E.2d 1309 (Ind. Ct. App. 1979), the court stated "a retail unitary transaction exists when the transfer of the property and rendition of services are 'inextricable and indivisible'" from the property being transferred. Id. at 131. The court concluded that Framemakers' services were performed prior to the transfer of the property and constituted taxable retail unitary transactions pursuant to IC § 6-2.5-4-1(e). Id. Therefore, the court determined that Framemakers' service charges were subject to sales tax. Id. See also Galligan v. Indiana Dep't. of State Revenue, 825 N.E.2d 467, 480-81 (Ind. Tax Ct. 2005) (explaining that "the legislature has set forth several parameters for imposing tax on these transactions. First, taxable property does not escape taxation merely because it is transferred in conjunction with the provision of non-taxable services. Second, services, generally outside the scope of taxation, are subject to tax to the extent the income represents 'any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.' Finally, the legislature imposes tax on services that are provided in a retail unitary transaction, 'a unitary transaction that is also a retail transaction.' A unitary transaction is one which 'includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.'")

Taxpayer argued that it "sells to their customers, an insurance policy offered by [Vendor] called Express Code/Etch/Security." Taxpayer stated that "[t]his is an agreement in which [Vendor] will cover the end customer in the case of a vehicle theft." Taxpayer thus argued that it "simply sells this contract to their customer, similar to an insurance agent selling an insurance policy to their customer, and receives a commission upon the sale." Taxpayer submitted a blank copy of the agreement to support its protest.

Upon review, however, Taxpayer's argument and its reliance of Vendor's agreement is misplaced. First, Taxpayer did not reference any statutory authority to support its argument that the sales of optional products were exempt from sales tax. Vendor's agreement specifically stated that "This Limited Guarantee is a Product Warranty and is not Insurance. It is not subject to state insurance laws but is subject to state law concerning warranties . . . ." In other words, insurance practices are regulated by states. To sell insurance policies in the state, Taxpayer is required to obtain the licenses and permission from the state. Taxpayer had none and thus its argument must fail.

Second, as the audit noted and Taxpayer's representatives explained during the hearing, Taxpayer's employees installed or incorporated the necessary required components, such as tracking information or system, into the vehicles following its customers' purchase orders. Taxpayer charged its customers in the same sale invoices (buyers' orders) before customers accepted, signed, and completed the vehicle sales. Regardless of the

arrangements Taxpayer had with its Vendor, Taxpayer was the retail merchant who sold the optional products to its customers and installed or incorporated the products into the vehicles prior to customers' acceptance. Those sales were unitary transactions because "the transfer of the property and rendition of services [were] 'inextricable and indivisible'" from the property being transferred. Frame Station, 771 N.E.2d at 131. See also IC § 6-2.5-1-5(a)(3) (stating "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold . . . valued in money, whether received in money or otherwise, without any deduction for . . . **charges by the seller for any services necessary to complete the sale**, other than delivery and installation charges . . . ." (**Emphasis added**).)

FINDING

Taxpayer's protest of the imposition of sales tax on vehicles and optional products is respectfully denied.

II. Use Tax - Imposition.

The audit assessed Taxpayer additional use tax on various purchases, including computers because there were no invoices to be found during the audit. Taxpayer claimed that the audit's assessment of use tax is overstated because it either paid sales tax at the time of purchases or the transaction was void and it was not responsible for the tax.

In addition to a sales tax, Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and 45 IAC 2.2-3-4.

Taxpayer in this instance submitted several purchase invoices and a receipt to support its claim that it was not responsible for the use tax. The transactions at issue listed in the audit summary are, as follows:

Date	Asset	Reference #	Item Description	Taxable Amount
03/04/13	462	No Invoice	Computers	$1,324.66
08/02/13	473	No Invoice	[] Floor Scrubber	$4,666.93
11/20/14	Unknown	81080	Salt Spreader	$5,600.00

Upon review, the Department is prepared to agree that Taxpayer's documents substantiate its claim. Thus, the Department will remove the three items from the assessment and recalculate Taxpayer's tax liability.

FINDING

Taxpayer's protest of the imposition of use tax is sustained.

III. Tax Administration - Negligence Penalty.

DISCUSSION

The Department's audit imposed a ten percent negligence penalty for the tax period in question. Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

(1) fails to file a return for any of the listed taxes;
(2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
(3) incurs, upon examination by the department, a deficiency that is due to negligence;
(4) fails to timely remit any tax held in trust for the state; or
(5) is required to make a payment by electronic funds transfer (as defined in IC 4-8.1-2-7), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

45 IAC 15-11-2(b) further states:

> "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
>
> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
>
> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Department's audit imposed the negligence penalty because Taxpayer did not maintain adequate records. Specifically, Taxpayer did not properly document the vehicles it sold to out-of-state customers and it (or its employees) physically delivered the vehicles to out-of-state locations. Also, a review of the Department's records, Taxpayer did not have a good compliance history. Taxpayer had various tax liabilities which were resulted from its failure to remit the proper amount of taxes or timely filed the required returns. Since Taxpayer did not affirmatively establish reasonable cause, the Department is not able to agree that in this instance the negligence penalty should be abated.

Nonetheless, the use tax imposed on three items under Issue II is sustained, so the penalty on those items will be removed from the assessment.

FINDING

Taxpayer's protest of the imposition of negligence penalty is respectful denied, except the penalty assessed on the three items under Issue II.

SUMMARY

Taxpayer's protest is sustained in part and respectfully denied in part. On Issue I, Taxpayer's protest is respectfully denied. On Issue II, Taxpayer's protest of the imposition of use tax and also the related negligence penalty is sustained. On Issue III, Taxpayer's protest of the negligence penalty in general is respectfully denied.

Posted: 08/30/2017 by Legislative Services Agency
An html version of this document.